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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Luz Matson,) CIV. 12-8206-PCT-PGR
10 Plaintiffs,)
11 v.) **ORDER**
12 Safeway, Inc.,)
13 Defendant.)

14 Defendant has filed a Motion for Summary Judgment. (Doc. 27.). The matter is fully
15 briefed. (Docs. 31, 33.) The Court has determined that oral argument would not materially
16 assist its ruling. For the reasons set forth below, the motion will be granted.

17 **I. BACKGROUND**

18 Plaintiff was employed at the Williams, Arizona, Safeway store. On August 6, 2011,
19 after she had finished her shift and was leaving work, she observed a shoplifter outside of the
20 store. Plaintiff approached the individual and asked him to return to the store. Inside the
21 store, the shoplifter pushed Plaintiff and attempted to flee. A chase ensued. Plaintiff and
22 several other Safeway employees eventually apprehended the shoplifter, tackling him to the
23 ground. Plaintiff was injured during the incident, suffering torn ligaments in her thumb.

24 Safeway suspended Plaintiff, investigated the incident, and concluded that five
25 employees, including Plaintiff, violated its shoplifting policy, which generally forbids
26 employees from pursuing shoplifters. On August 7, 2011, Plaintiff filed a workers'
27 compensation claim.

28 Safeway offered Plaintiff and the three other union members who violated the policy
a chance to keep their jobs if they signed a Last Chance Agreement ("LCA"). Plaintiff

1 rejected the LCA. Consequently, Safeway terminated her employment. The three other union
2 members signed the LCA and returned to their jobs with the same salaries and benefits. After
3 negotiations with Plaintiff's union, Safeway extended her time to sign the LCA until
4 December 2, 2011. However, Plaintiff again rejected the LCA and her employment was
5 terminated.

6 On August 29, 2012, Plaintiff filed a complaint in the Coconino County Superior
7 Court, alleging wrongful termination in violation of A.R.S. § 23-1501(3)(c)(ii) and (iii), and
8 intentional infliction of emotional distress. (Doc. 1, Ex. A.) Plaintiff alleges that she was
9 wrongfully terminated in retaliation for seeking workers' compensation benefits. Defendants
10 removed the case on October 4. (Doc. 1.) They filed the pending motion for summary
11 judgment on September 17, 2013.

12 **II. SUMMARY JUDGMENT**

13 Summary judgment is appropriate when the "pleadings, depositions, answers to
14 interrogatories, and admissions on file, together with the affidavits, if any, show that there
15 is no genuine issue as to any material fact and that the moving party is entitled to a judgment
16 as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of
17 establishing the absence of any genuine issue of material fact; it must present the basis for
18 its summary judgment motion and identify those portions of the record that it believes
19 demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477
20 U.S. 317, 323 (1986).

21 A material fact is one that might affect the outcome of the case under governing law.
22 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To preclude summary judgment,
23 a dispute about a material fact must also be "genuine," such that a reasonable jury could find
24 in favor of the non-moving party. *Id.* In determining whether the moving party has met its
25 burden, the court views the evidence in the light most favorable to, and draws all reasonable
26 inferences in favor of, the nonmovant. *See Allen v. City of Los Angeles*, 66 F.3d 1052, 1056
(9th Cir. 1995); *Gibson v. County of Washoe*, 290 F.3d 1175, 1180 (9th Cir. 2002).

27 If the moving party meets its burden with a properly supported motion for summary
28 judgment, then the burden shifts to the non-moving party to present specific facts that show

1 there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *see Matsushita Elec. Indus. Co. v.*
2 *Zenith Radio*, 475 U.S. 574, 587 (1986). The nonmovant may not rest on bare allegations or
3 denials in his pleading, but must set forth specific facts, by affidavit or as otherwise provided
4 by Rule 56, demonstrating a genuine issue for trial. *Id.*; *see Anderson*, 447 U.S. at 248–49.
5 Conclusory allegations, unsupported by factual material, are insufficient to defeat a motion
6 for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). The mere
7 existence of a scintilla of evidence supporting the nonmovant’s petition is insufficient; there
8 must be evidence from which a trier of fact could reasonably find for the non-movant. *See*
9 *Matsushita*, 475 U.S. at 586.

10 **III. DISCUSSION**

11 **A. Wrongful Termination**

12 Plaintiff alleges that Safeway violated Arizona’s Employment Protection Act
13 (“AEPA”), A.R.S. § 23-1501(3)(c)(iii), by terminating her employment in retaliation for
14 seeking workers’ compensation benefits. To succeed on this claim, Plaintiff must show that:
15 (1) she engaged in a protected activity, (2) she suffered an adverse employment action, and
16 (3) there is a causal link between the two. *See Hernandez v. Spacelabs Medical Inc.*, 343
17 F.3d 1107, 1113 (9th Cir. 2003); *Levine v. TERROS, Inc.*, No. CV-08-1458-PHX-MHM,
18 2010 WL 864498, at *8 (D.Ariz. March 9, 2010). If Plaintiff provides sufficient evidence to
19 make out a *prima facie* case of retaliation, then the burden shifts to Safeway to articulate
20 some legitimate, non-retaliatory reasons for its actions. *Porter v. California Dept. of*
21 *Corrections*, 419 F.3d 885, 894 (9th Cir. 2005). If Safeway sets forth such a reason, then
22 Plaintiff bears the burden of providing evidence that the reason is merely a pretext for the
23 underlying retaliatory motive. *Id.*

24 As Safeway acknowledges, Plaintiff’s complaint satisfies the first and second
25 elements of a wrongful termination claim, by alleging that she engaged in protected activity
26 by filing a workers’ compensation claim against Safeway and suffered an adverse
27 employment action when she was terminated. Safeway argues, however, that it is entitled to
28 summary judgment on Plaintiff’s wrongful termination claim because she has failed to
produce any evidence connecting her protected activity to her termination. The Court agrees.

1 To establish causation, Plaintiff must show that “engaging in the protected activity
2 was one of the reasons for her firing and that but for such activity she would not have been
3 fired.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (citations
4 omitted); *see Knox v. United Rentals Highway Technologies, Inc.*, No. CV-07-297-PHX-
5 DKD, 2009 WL 806625 at *5 (D.Ariz. March 26, 2009) (explaining that plaintiff must show
6 employer had a “retaliatory motive [that] played a part in the employment action”) (citing
7 *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 798 (9th Cir. 1982)).

8 Safeway asserts that it fired Plaintiff because, unlike the other employees involved in
9 the incident, she refused to sign the LCA. In making this assertion, Safeway has articulated
10 a legitimate, non-retaliatory reasons for its actions. The record is clear that Safeway had a
11 policy under which only trained employees were permitted to detain suspected shoplifters
12 (*see* Doc. 28, ¶¶ 36–39) and that Plaintiff violated that policy by confronting and chasing the
13 suspected shoplifter.

14 Safeway’s shoplifting policy advises employees:

15 If you become aware that someone may be leaving the store with merchandise
16 and not paying for it, report the incident to management immediately. Only
17 employees who have been specifically designated and trained may detain any
person suspected of shoplifting. Under no circumstances may any employee
pursue or otherwise chase in an attempt to detain the suspected shoplifter
within the store or outside the premises.

18 (Doc. 28, Ex. F at 20.) The policy further states that Safeway “will not tolerate any violation
19 of this policy and any employee who decides to pursue or otherwise chase in an attempt to
20 detain a shoplifter will be discharged irrespective of whether anyone got hurt or the
21 company’s property was recovered.” (*Id.*) Plaintiff was made aware of the policy through her
22 training and orientation, and received a copy of an Employee Handbook containing the
23 shoplifting policy. (*Id.*, ¶¶ 15–32.)

24 Pursuant to its shoplifting policy, Safeway suspended all of the employees involved
25 in the August 6, 2011, incident. The other employees signed the LCA and returned to work.
26 Plaintiff refused to sign the LCA and was fired.

27 Plaintiff contends that this asserted reason was a pretext, and that she was fired in
28 retaliation for filing a workers’ compensation claim. She asserts that the only basis for

1 distinguishing her treatment from that of the other employees involved in the incident was
2 the fact that she filed for workers' compensation, a claim she did not wish to forego by
3 signing the LCA. She also insists that Safeway's shoplifting policy has been inconsistently
4 applied, and that other employees have been treated with more lenience after violating the
5 shoplifting policy. The Court is not persuaded.

6 Safeway has presented evidence that in similar incidents, in which violations of the
7 shoplifting policy were investigated and reported to the relevant authority—here, Stuart
8 Marcus, Director of Labor Relations for Safeway's Phoenix Division—all of the individuals
9 involved were either terminated or offered LCAs in lieu of termination. (Doc. 28, Ex. J, ¶¶
10 22, 24.) Marcus states in his declaration that “[o]n the rare occasion when a Union member
11 has rejected a LCA, as Plaintiff did here, he or she has been terminated in every case without
12 exception.” (*Id.*, ¶ 23.) Plaintiff does not offer evidence that Safeway, as opposed to
13 individual stores, inconsistently disciplined similarly-situated employees who violated the
14 company's shoplifting policy.

15 Finally, as Safeway points out, on three past occasions Plaintiff filed workers'
16 compensation claims without suffering any negative repercussions. (Doc. 28, ¶¶ 160–64.)
17 This background undermines Plaintiff's suggestion that Safeway was motivated to terminate
18 her employment by the fact that she sought workers' compensation after the shoplifting
19 incident.

20 Based on these circumstances, Plaintiff has failed to demonstrate a causal link
21 between her filing for workers' compensation benefits and her ultimate termination, and has
22 failed to sustain her burden of showing that Safeway's proffered nonretaliatory reason for
23 her termination was pretextual. *See Snead v. Metropolitan Prop. & Cas. Ins. Co.*, 237 F.3d
24 1080, 1094 (9th Cir. 2001) (employer entitled to summary judgment where plaintiff failed
25 to raise a genuine issue of material fact regarding the truth of employer's proffered legitimate
26 reason for termination).

26 **B. Intentional Infliction of Emotional Distress**

27 Plaintiff asserts a claim of intentional infliction of emotional distress claim against
28 Safeway, alleging that its actions constituted extreme and outrageous conduct. To prevail on

1 a claim of intentional infliction of emotional distress under Arizona law, a plaintiff must
2 prove three elements: (1) that the defendant's conduct was "extreme" and "outrageous"; (2)
3 that the defendant either intended to cause emotional distress or recklessly disregarded the
4 near certainty that such distress would result from his conduct; and (3) that severe emotional
5 distress in fact occurred as a result of the defendant's conduct. *Citizen Publ'g Co. v. Miller*,
6 210 Ariz. 513, 516, 115 P.3d 107, 110 (2005); see *Johnson v. McDonald*, 197 Ariz. 155, 160,
7 3 P.3d 1075, 1080 (App. 1999).

8 With respect to the first element, a plaintiff must show that the defendant's conduct
9 was "so outrageous in character, and so extreme in degree, as to go beyond all possible
10 bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized
11 community." *Johnson*, 197 Ariz. at 160, 3 P.3d at 1080. The "conduct necessary to sustain
12 an intentional infliction claim falls at the very extreme edge of the spectrum of possible
13 conduct." *Watts v. Golden Age Nursing Home*, 127 Ariz. 255, 258, 619 P.2d 1032, 1035
14 (1980). "A plaintiff must show that the defendant's acts were so outrageous in character and
15 so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as
16 atrocious and utterly intolerable in a civilized community." *Mintz v. Bell Atlantic Sys.*
17 *Leasing Int'l, Inc.*, 183 Ariz. 550, 554, 905 P.2d 559, 563 (App. 1995). Under this standard,
18 even a defendant's "unjustifiable" conduct does not necessarily rise to the level of
19 "atrocious" and "beyond all possible bounds of decency" that would cause an average
20 member of the community to believe it was "outrageous." *Nelson v. Phoenix Resort Corp.*,
21 181 Ariz. 188, 199, 888 P.2d 1375, 1386 (App. 1994). The court determines whether the acts
22 at issue are sufficiently outrageous to state a claim for relief. *Johnson*, 197 Ariz. at 160, 3
P.3d at 1080.

23 The Court finds that Plaintiff has failed as a matter of law to establish such a claim
24 here. Arizona courts have noted that in the employment context "it is extremely rare to find
25 conduct . . . that will rise to the level of outrageousness necessary to provide a basis for
26 recovery for the tort of intentional infliction of emotional distress." *Mintz*, 183 Ariz. at 554,
27 905 P.2d at 563 (quoting *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 395 (3d Cir.1988)).
28 Termination decisions and circumstances surrounding an employer's method of discharging

1 an employee, whether wrongful or not, generally do not rise to a level of conduct extreme
2 enough to establish an intentional infliction of emotional distress claim. *Id.*; *Nelson*, 181
3 Ariz. at 200, 888 P.2d at 1387. A review of *Mintz* and *Nelson* demonstrates that Plaintiff's
4 allegations fall far short of stating a claim for intentional infliction of emotional distress.

5 In *Mintz*, the court granted the employer's motion to dismiss an intentional infliction
6 of emotional distress claim where the plaintiff alleged that the defendant had twice failed to
7 promote her, discriminating against her on the basis of sex. 183 Ariz. at 552–54, 905 P.2d
8 at 561–63. The lost promotions caused the plaintiff to suffer severe emotional problems and
9 she took disability leave. *Id.* Her employer then forced her to return to work several weeks
10 earlier than her doctor recommended. *Id.* The plaintiff worked for one day but the stress of
11 her workplace caused her to be hospitalized. *Id.* Her employer then hand-delivered a letter
12 of termination to her while she was hospitalized. *Id.* Nevertheless, the court concluded that
13 the employer's conduct, while "callous and insensitive," was not sufficiently extreme and
14 outrageous to state a claim against her employer for intentional infliction of emotional
15 distress. *Id.* at 555, 905 P.2d at 564.

16 In *Nelson*, the plaintiff learned of his termination when his employer called him at
17 2:00 a.m. 181 Ariz. at 192, 888 P.2d at 1379. At his office the plaintiff was met by armed
18 security guards who escorted him to the lobby, where he fired in front of news media that had
19 been invited to watch the termination. *Id.* The court held that this conduct was not extreme
20 and outrageous enough to support an intentional infliction of emotional distress claim. *Id.* at
21 200, 888 P.2d at 1387.

22 Falling far short of the callous conduct displayed in these case, Safeway's actions in
23 terminating Plaintiff's employment for violating of its shoplifting policy, after twice offering
24 her the opportunity to keep her job by signing the LCA, was not sufficiently extreme and
25 outrageous to state a claim for intentional infliction of emotional distress.

26 **IV. CONCLUSION**

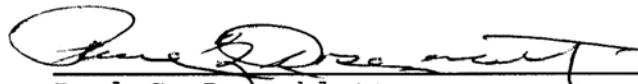
27 Having viewed the evidence in the light most favorable to Plaintiff and drawn all
28 reasonable inferences in her favor, the Court concludes that Safeway is entitled to summary
judgment. Plaintiff's wrongful termination claim is unsupported by any evidence linking her

1 termination to retaliation for her workers' compensation claim, and she has not shown that
2 Safeway's proffered reason for her termination was a pretext for retaliation. Safeway is
3 entitled to summary judgment on Plaintiff's intentional infliction of emotional distress claim
4 because she has not demonstrated that Safeway engaged in any extreme and outrageous
5 conduct.

6 Accordingly,

7 IT IS HEREBY ORDERED granting Defendant Safeway's Motion for Summary
8 Judgment (Doc. 27). The Clerk of the Court shall enter judgment in favor of Defendant.

9 DATED this 17th day of December, 2013.

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11 
12 Paul G. Rosenblatt
United States District Judge